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2  
3 UNITED STATES DISTRICT COURT  
4 DISTRICT OF MASSACHUSETTS

5 IN RE: NEW ENGLAND COMPOUNDING ) MDL NO. 13-02419-RWZ  
6 PHARMACY CASES LITIGATION )  
7 )  
8 )  
9 )  
10 )

11 BEFORE: THE HONORABLE JENNIFER C. BOAL  
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14 **MOTIONS HEARING**  
15 **AND**  
16 **STATUS CONFERENCE**  
17

18 John Joseph Moakley United States Courthouse  
19 Courtroom No. 12  
20 One Courthouse Way  
Boston, MA 02210

21 January 14, 2016  
22 2:00 p.m.

23 Catherine A. Handel, RPR-CM, CRR  
24 Official Court Reporter  
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## P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Jennifer C. Boal, Magistrate Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on January 14, 2016.)

COURTROOM DEPUTY CLERK YORK: The Honorable Jennifer C. Boal presiding. You may be seated.

Today is January 14th, 2016. We're on the record in the matter of NECC, Case No. 13-MD-2419. Will counsel in the courtroom please identify themselves for the record.

MS. JOHNSON: Good afternoon, your Honor. Kristen Johnson for the Plaintiffs' Steering Committee.

MS. MARTIN: Good afternoon, your Honor. Annika Martin for the Plaintiffs' Steering Committee.

MR. STRANCH: Good afternoon, your Honor. Gerard Stranch for the Plaintiffs' Steering Committee.

MR. ELLIS: Rick Ellis for various plaintiffs.

MR. TARDIO: Chris Tardio and Matt Cline for the Tennessee Clinic Defendants.

MR. KRAUSE: Kent Krause for SSC and Dr. Lister.

MS. GREER: Marcy Greer for the Saint Thomas Entities.

MR. KIRBY: Greg Kirby for the Box Hill defendants.

THE COURT: Anyone else?

1           So, I don't know, Ms. Johnson, if you wanted to run  
2 us through -- go back through the agenda, I guess, and pick up  
3 what we did not discuss before Judge Zobel.

4           MS. JOHNSON: Yes, your Honor. I think we have two  
5 motions for which oral argument has been arrested and unless  
6 your Honor has a preference, I'll take them in the way they  
7 happen to be listed, which is No. 1, the Saint Thomas  
8 Entities' motion to amend the Bellwether schedule.

9           THE COURT: So, I'll hear from Saint Thomas first.

10          MR. TARDIO: Your Honor, Chris Tardio. I will  
11 address that.

12          It was a joint effort by Saint Thomas and STOPNC  
13 defendants and, basically, we've come to the point, we  
14 believe, and respectfully submit, we've run out of days to do  
15 the discovery left to be done. I've reviewed -- and we've  
16 spoken in the last week or so with the PSC several times,  
17 exchanged red lines and, I believe, made some progress. I  
18 think both sides -- I won't speak for them -- agree, I think,  
19 that some extension is necessary and maybe the dispute at this  
20 point is how much, but let me respectfully submit -- or  
21 suggest a few points to the Court that the Court may want to  
22 consider in building this schedule and adapting the schedule  
23 as the litigation goes forward.

24          One, as I look at 2578-1, which is the plaintiffs'  
25 submission filed just yesterday, I believe, or the day before,

1 it only allows us about 60 days to do common expert discovery  
2 from 1/29 -- common expert depositions 1/29 to 3/28/16. That  
3 is probably going to be about 30 depositions when we combine  
4 our experts, the plaintiffs' experts and Saint Thomas'  
5 experts, and the Court may think, well, maybe you can do 30  
6 depositions in 60 days if we just do them in 60 days, but --

7 THE COURT: You're super human, right?

8 MR. TARDIO: True.

9 But there are also -- these activities are running  
10 concurrent with case-specific discovery, as the Court is  
11 aware, extensive motion practice on legal issues, discovery  
12 issues. So, it's not as if we only have to take these common  
13 expert depositions.

14 The second point, the same issues arises with the  
15 deadline set out for case-specific experts. Under the  
16 plaintiffs' proposal, we get about 27, 28 days to do all case-  
17 specific expert depositions. That is just not enough time.

18 What we have proposed, both in meet-and-confers and  
19 in our filings -- at least the STOPNC defendants have proposed  
20 that case-specific expert discovery happen after the Court  
21 selects the four cases that are going to be the four lead  
22 trial cases. I think that would significantly help everyone  
23 because we wouldn't be doing case-specific expert discovery in  
24 all eleven or twelve cases. We would just be doing it in the  
25 four trial cases. That's one suggestion we had made.

1           We also think it may benefit the parties and the  
2 Court should consider extending the common expert discovery --  
3 common expert deposition deadline and run that the same as the  
4 case-specific expert discovery deadline. So that basically we  
5 have both tracking at the same time and ending at the same  
6 time.

7           One more point that I would like to highlight for the  
8 Court deals with Bellwether selections. The order that's in  
9 place requires us, I believe by this Friday, to draft and  
10 submit a brief that, as I understand it, advocates for the  
11 cases that we think should be tried first.

12           I would respectfully suggest that it makes more sense  
13 to execute our strikes on each side so that we're not arguing  
14 about cases that are ultimately stricken.

15           So, what I would suggest is that something be -- the  
16 schedule that comes out be modified such that we -- each side  
17 executes their strikes and then a week or so later we argue  
18 about which cases should be tried first. I think at this  
19 point we're supposed to argue about the cases at the same time  
20 we're executing our strikes.

21           The last point I will -- well, two points quickly.  
22 The deadlines submitted by the plaintiffs or proposed by the  
23 plaintiffs, as I read them, have a deadline to submit *Daubert*  
24 motions which comes before -- or at the exact same time as the  
25 close of case-specific expert discovery. I think that there

1 has to be some stagger there. If we're going to challenge a  
2 case-specific expert, I think we have to have time -- I mean,  
3 if we take a -- for instance, if we take a deposition on April  
4 17th, we want to challenge that expert, we're not going to be  
5 able to file that motion on April 18th, and probably won't  
6 even have the transcript back. Won't have the transcript back.

7 Last point, I think that any mediation deadline in  
8 the order that the Court fashions should be 30 or 45 or 60  
9 days after the conclusion of discovery. If we're going to put  
10 a deadline on mediating it, I think it should be after  
11 discovery ends if there's going to be a deadline in there.

12 THE COURT: I had noticed that. Is there some -- I  
13 guess I hadn't heard about that before or maybe I missed it.  
14 Are the parties interested in mediation or not?

15 MR. TARDIO: We have at no time said that we are not  
16 interested in mediating these cases. We have -- I don't want  
17 to call them terms, but we have some things that we think are  
18 important in the mediation process, that all the cases be  
19 mediated at one time for a common resolution as opposed to  
20 just mediating one set of Tennessee cases or one subset. We  
21 have also advocated that that should come at or near the end  
22 of common discovery. So, when -- can I commit to mediating  
23 the case now? No, but we've never foreclosed that.

24 THE COURT: I would -- obviously, it's going to be up  
25 to Judge Zobel when she tries cases. I wouldn't bank on the



1 fact that she would delay a trial date because of mediation  
2 efforts, given how long the cases have been pending, and the  
3 opportunities to mediate during the course of this. So, I  
4 think I would just -- obviously, she can do what she would  
5 like, but I wouldn't -- if I was in your shoes, I wouldn't bet  
6 on her putting off the trial date for mediation. I could be  
7 wrong.

8 MR. TARDIO: Okay. What I was suggesting -- and  
9 maybe I was not clear -- is that we conclude at least the  
10 common portion of the case discovery before we mediate these  
11 cases.

12 THE COURT: Because there doesn't seem to be a lot of  
13 time left in terms of --

14 MR. TARDIO: True.

15 THE COURT: So, I guess I would encourage you -- and  
16 it sounds as if -- would you be engaging private mediators?

17 MR. TARDIO: Probably, but we haven't gotten that far  
18 in the discussions.

19 THE COURT: I would encourage you, if you do think  
20 you would be interested in mediation -- obviously, it's a  
21 voluntary process. It's not worthwhile, particularly if the  
22 defendants are not interested in doing it -- that you explore  
23 that now rather than waiting until -- at least who you would  
24 pick and they may not have time. So, I think that would be  
25 worthwhile, the parties exploring now rather than waiting

1 until the summer to do so.

2 MR. TARDIO: Understood, your Honor.

3 THE COURT: In terms of the schedule -- and I have to  
4 say, I haven't looked at it recently. When is it anticipated  
5 that it would be teed up for Judge Zobel to decide who the  
6 Bellwether -- or which plaintiffs would be going to trial or  
7 defendant -- when is it teed up for her to make that decision?

8 MR. TARDIO: I think under the current order, we are  
9 required to file a brief on that issue this Friday -- and  
10 somebody can correct me if I'm wrong -- which at that point it  
11 would be --

12 THE COURT: Ready for decision.

13 MR. TARDIO: I believe so.

14 Now, another problem with that is we haven't finished  
15 all the plaintiffs' depositions. Some of them have been  
16 suspended along the way. Some others have had to be moved.  
17 So, that's another reason that it's difficult to argue about  
18 these cases without having seen the people.

19 MS. GREER: Your Honor, for the Saint Thomas  
20 Entities, we are comfortable and agree with the proposal to  
21 pick the four Bellwethers first and then do -- work up the  
22 case-specific expert discovery, et cetera. We think those are  
23 good suggestions and staggering the strikes and having a  
24 little bit of time after the strikes to file the briefs to  
25 support that. We can do that, you know, fairly quickly, but

1 we do need to have those depositions.

2 THE COURT: Thank you.

3 MR. STRANCH: Thank you, your Honor. Gerard Stranch  
4 for the Plaintiffs' Steering Committee.

5 Conceptually speaking, the big problem is we're  
6 adding a bunch of little things, is what the Saint Thomas  
7 Entities are doing, a bunch of little things here and there,  
8 and then when you get to the end of the schedule, you realize  
9 we're extending things all the way into the end of summer and  
10 that's way too far. These cases have been sitting on the  
11 docket for a very long time. We've been litigating them very  
12 hard. These defendants refuse to open case-specific discovery  
13 when we thought it was open and wasted 90 days on that until  
14 the courts finally said, yes, it is clearly open, go start --  
15 go forth and discover.

16 So, we've done our part, you know, and these -- this  
17 doesn't need to be delayed any further. I mean, the simple  
18 truth of the matter is the Plaintiffs' Steering Committee is  
19 getting the cases ready. We're moving the cases forward. In  
20 an effort to compromise to avoid having to tie up more  
21 judicial time, we made this offer that would extend everything  
22 approximately 45 days from the current schedule so that we  
23 could get everything done in a timely fashion that will  
24 provide some additional time to the defendants, which we think  
25 is more than enough time. We've gone through the hard part of

1 getting our experts together and we got them disclosed.  
2 Defendants' experts, common experts are due tomorrow. That  
3 date does not need to be moved again. It's been moved  
4 multiple times already. Most of the fact portion of the case-  
5 specific depositions have already taken place, either through  
6 the treater doctors, thanks to the Court's order from the last  
7 session. Most of those have now gone forward. Most of the  
8 plaintiffs have already sat for their depositions. A couple  
9 of them did have to be suspended after an 80-year-old man sat  
10 for a six-hour deposition or defendants said they wanted to  
11 come back to ask some additional questions. These people are  
12 not in the greatest of health, and we've been amenable to  
13 that. We've worked with them on all of these issues, but what  
14 we don't need to do is just put more and more time into the  
15 schedule that's going to keep us from the ultimate goal, which  
16 is getting to a trial so that these people can have their day  
17 in court. They've waited years already.

18 We think our schedule is very easy to meet. We think  
19 we can meet the current schedule without these extensions, but  
20 we're willing to do the extensions because the defendants  
21 asked us if we would, but we just think 90 days is too far,  
22 it's too long, and it puts off a long time before the people  
23 actually get to a trial.

24 Conceptually speaking, your Honor, we do not have a  
25 problem with doing the Bellwether strikes first and then

1 submitting our briefs to the Court as to who we want. That's  
2 not a problem, but what we don't need to do is bump the entire  
3 schedule two weeks to do that. We don't need to bump all the  
4 other dates just for that.

5 And doing the case-specific experts after the Court  
6 picks the cases, assuming the Court picks the cases shortly  
7 after we disclose them under our schedule and file with the  
8 Court, then, that's what will happen, but what we don't need  
9 to do is put the entire case on hold while we wait for Judge  
10 Zobel to make that ruling, because Judge Zobel may rule in a  
11 week. She may take 30 days, but we don't need to stop all the  
12 presses while that goes on. We should continue to work up the  
13 cases and get stuff ready.

14 THE COURT: So, right now when are those strikes due?

15 MR. STRANCH: As it stands today, they're due  
16 tomorrow.

17 THE COURT: As well as -- so, right now it's the  
18 strikes and the briefs are due tomorrow?

19 MR. STRANCH: That's correct, your Honor.

20 THE COURT: And from the defendants' perspective, it  
21 sounds as if you would go forward tomorrow if you had to, but  
22 I think it -- I'm going to extend the deadline. So, you're  
23 not going to be filing things tomorrow. I don't know if I'll  
24 get the ruling out tomorrow. I just need to, obviously, pick,  
25 you know, which version or a compromise version, one of the

1 two. All right. So, that's what we'll do. Anything else?

2 MR. STRANCH: Unless your Honor has a specific  
3 question about any of the dates.

4 THE COURT: No. I thought the briefings were fairly  
5 clear on that. So, thank you. All right. So, I will take  
6 that under advisement.

7 MR. STRANCH: Thank you.

8 MS. GREER: Your Honor, common issue summary judgment  
9 deadlines are also tomorrow, and we had asked that those be  
10 extended.

11 THE COURT: Yes. So, any deadlines that are for my  
12 consideration in these motions, if it's tomorrow -- I don't  
13 know if I'll get the decision out tomorrow, but you don't need  
14 to comply with them. I will extend the deadlines. I just  
15 need to pick for how long.

16 MR. STRANCH: Hold on, your Honor.

17 Does that mean that the defendants don't have to  
18 disclose their common experts tomorrow?

19 THE COURT: I don't think that's one of the deadlines  
20 that was --

21 MR. STRANCH: Okay.

22 MR. TARDIO: We've never asked to extend that.

23 MR. STRANCH: I just wanted to -- because the Court  
24 said anything tomorrow. I just wanted to make sure that there  
25 wasn't --

1 THE COURT: No. No. Anything that I've been asked  
2 to change for tomorrow.

3 MR. STRANCH: Okay.

4 THE COURT: Anything that I've been asked to change  
5 that's actually due tomorrow doesn't need to be due tomorrow,  
6 but I didn't understand that the common experts was one of the  
7 deadlines that I was asked to change.

8 MR. STRANCH: It had not been requested, but I just  
9 wanted to clarify.

10 THE COURT: All right. Did anyone else need any  
11 clarification based on what I just said? No? All right.

12 MS. JOHNSON: I think that brings us to the second  
13 motion for which the parties requested oral judgment, which is  
14 the PSC's motion to compel Specialty Surgery Center and Dr.  
15 Lister to provide documents and testimony, and Mr. Stranch  
16 will be addressing that as well.

17 MR. STRANCH: Good afternoon again, your Honor.

18 To set the stage very quickly, there is -- there are  
19 two main clinic groups in Tennessee. There's the Saint Thomas  
20 Entities and then there's the Specialty Surgery that are in  
21 east Tennessee. This motion relates to the Specialty Surgery  
22 and Dr. Lister, which is the second set of clinics outside of  
23 Nashville in east Tennessee and they're also on a separate  
24 timeline than the Bellwethers.

25 This motion relates specifically to discovery that

1 was served surrounding the drug formulary. This is the one  
2 where we discovered through a deposition of the Calishers that  
3 the drug formulary that had been given to us and represented  
4 both by counsel and the clients as being the drug formulary in  
5 effect was not actually in effect. We now know that that drug  
6 formulary was never approved by the medical executive  
7 committee.

8 We know that counsel that turned it over had both  
9 formularies and did not give us the one that did not include  
10 DepoMedrol, which was the drug that was used here that was in  
11 effect. Instead, gave us a formulary that was never approved  
12 and did include DepoMedrol.

13 What we've asked is that we get all the documentation  
14 surrounding that change and we've asked for questions as to  
15 what diligence was done around the representations that this  
16 formulary was in effect and, your Honor, instead of trying to  
17 go through everything in great detail, I'll try to explain the  
18 conceptual differences that we're having.

19 One of the main ones is the changes to this formulary  
20 were made in April of 2013. Our ESI protocol has a cutoff  
21 before then. So, all the ESI was not gathered that included  
22 2013. Now, the email boxes did, but all the other ESI didn't,  
23 and one of the big conceptual problems we've been having is I  
24 said I want you to go get the rest of the electronic  
25 information you have that includes 2013 and search that,



1 because this is a big deal.

2 THE COURT: I had thought that -- maybe I  
3 misremembered, but I thought that the defendants have  
4 represented that they ran undated searches.

5 MR. STRANCH: Through the documents that they had  
6 already collected in which they excluded 2013 beforehand.

7 THE COURT: You mean the 40,000?

8 MR. STRANCH: No. That 40,000 -- so, the way it  
9 worked was the defendants went and grabbed electronic  
10 information from Specialty Surgery. It was not everything  
11 that they had. It was date limited, except for the email  
12 boxes, is my understanding, because you can't cut those off.  
13 They ran search terms on that and had produced documents of  
14 which they reviewed and then produced to us.

15 The problem is that initial grouping of documents was  
16 already date limited. So, when they ran further searches on  
17 it, because some ESI did get through that, some didn't, they  
18 did not have all the 2013 materials there, and when I asked  
19 them to go back and to gather the rest of that electronically-  
20 stored information that would include all of 2013 instead of  
21 just bits and pieces of 2013, I was told absolutely not. It's  
22 going to be too expensive.

23 And so, we're moving to compel them to do that and to  
24 run those searches on that so that we get the full document  
25 production that we're entitled to around this issue. That's

1 one of the big issues that's a problem.

2 The other issue that we've got, your Honor, that  
3 arises out of that is the re-depositions of Dr. Lister and Dr.  
4 Atkinson -- and Jean Atkinson, the nurse. They both  
5 testified. Dr. Lister testified multiple times when asked  
6 that DepoMedrol was on the drug formulary. He said that. It  
7 was not. It was never approved and put on there.

8 THE COURT: So, my understanding of the -- I mean,  
9 obviously, the defendants can correct me when they speak, but  
10 I had understood they did not oppose a re-deposition, but that  
11 it should be limited and, also, that they felt it should be  
12 not a separate common discovery, but that it should be taken  
13 even if it could be construed as common during the case-  
14 specific discovery because these individuals likely would be  
15 deposed again.

16 MR. STRANCH: So, first off, your Honor, the  
17 limitations, it creates problems because every time we've  
18 gotten a filing on this issue, we've learned new information  
19 that we didn't think we would have to go into, and we already  
20 have enough fights in depositions over common versus case  
21 specific, and I can give you a specific example.

22 In a recent deposition of a doctor, the question the  
23 doctor was asked was, "Doctor, when you referred the plaintiff  
24 to STOPNC for a steroid injection, did you know at that time  
25 that they were purchasing from NECC?"

1           Counsel objected and instructed him not to answer  
2 because they said that's a common issue, not a case-specific  
3 issue, and we're going to be filing a motion on that as well,  
4 but we enough fights over what's allowed to ask and what's not  
5 and people being instructed not to answer. We don't need it  
6 in this case, particularly because once people start telling  
7 the truth, they may start saying new things that we didn't  
8 know and we may need to inquire into those areas.

9           THE COURT: Right, but in some ways that proposal  
10 would seem to answer that concern because even though they're  
11 being called for case specific, you could ask common issue  
12 about this limited issue. I took it more as limiting the  
13 number of times a person had to appear rather than saying, Oh,  
14 we're only going to take case specific at this time.

15           MR. STRANCH: Your Honor, at this time there is no  
16 schedule that would start any case-specific discovery as it  
17 relates to Specialty Surgery. So, in effect, we would not be  
18 able to inquire into it at all, and that's the problem,  
19 because we need to inquire into it because we don't know what  
20 additional written discovery we may have to do on this or if  
21 there's any additional witnesses that we may need to call to  
22 take testimony from that previously we thought had no  
23 relevance to any of this.

24           So, we need to go ahead and do those depositions so  
25 that we will know what else needs to be done, because the last

1 thing we need to do is get in the middle of case-specific  
2 discovery and then have to reopen common discovery because we  
3 need three new witnesses because they all point to different  
4 people, saying these were the people that told me to do it.

5 There's no reason to delay this. There's no reason  
6 to push this off. In fact, we were initially told they would  
7 under no circumstances agree to a re-deposition of them,  
8 period.

9 THE COURT: Well, here we go.

10 MR. STRANCH: So, now we're being told we can, but  
11 you have to take them at some indeterminant point in the  
12 future that may or may not ever come, and we won't be able to  
13 get to the bottom of this until we take their depositions.  
14 So, that's the issue as it relates to their depositions, your  
15 Honor, and we do need those.

16 Now, the last kind of area is we want a copy of the  
17 retention -- of the document retention letter, the litigation  
18 hold letter that was sent out. The defendants have opposed  
19 that and say you have not made a showing of spoliation. Well,  
20 we believe, if you review our reply brief, that we very  
21 clearly have.

22 What we do know, your Honor, is that Jean Atkinson  
23 faxed to Calishers a document that had handwriting on it with  
24 additions to the drug formulary. That document no one knows  
25 where it is. That document was sent after the litigation hold

1 was put into place. That document has been spoliated. It's  
2 gone. No one can find it. Now, maybe it will show up when  
3 they do the extra ESI searches. Maybe it's been scanned in  
4 and we didn't find it because it was scanned in in 2013, but  
5 we won't know until they do those searches, which they've so  
6 far refused to even gather that information to search it.

7 Now, we think we've met all the requirements to have  
8 that turned over so that we can see who received the letter  
9 and what the letter instructed them to do and whether they  
10 violated that letter when they sent it -- or when they  
11 destroyed that document or not.

12 We believe there also were additional documents that  
13 may have been destroyed as well. We won't know that for  
14 certain until we get into the depositions, though. We know  
15 there's nothing in writing telling Jean Atkinson to do this.  
16 We don't have the medical executive committee minutes. It has  
17 been represented to us by counsel that there's no mention of  
18 this in the medical executive committee minutes. So, maybe  
19 there was no instruction to her, but I'm guessing that the --  
20 that a nurse did not on her own decide to update the drug  
21 formulary and add 30 drugs to it, including the one in this  
22 litigation. Someone instructed her to do that.

23 So, we want to inquire into Jean Atkinson about that  
24 process in the deposition and we want to know what happened to  
25 the documents surrounding that, because there are none, which

1 is just, you know, hard to fathom in this day and age that  
2 there's nothing surrounding it. So, those are the documents  
3 that we want, your Honor.

4 The key thing on the search is we need that  
5 additional grouping of information to be gathered so that the  
6 searches will be effective. Otherwise, we're searching stuff  
7 that's already excluded that time period. We want the  
8 depositions without limitation because that would avoid us  
9 having to come back a third time and saying now we need to  
10 depose them on these three topics that we were told we  
11 couldn't and we need them now, not at some indeterminate point  
12 in the future so we can determine what additional discovery,  
13 if any, needs to be done, and we need the litigation hold  
14 letter, and we think -- and even the defendants admit that  
15 it's discoverable if we make a showing of spoliation, which we  
16 believe we've done.

17 THE COURT: My understanding is from your reply brief  
18 that your request with respect to the redactions to Exhibit 3  
19 have been satisfied.

20 MR. STRANCH: That has been resolved, your Honor.

21 THE COURT: Mr. Tardio.

22 MR. TARDIO: Thank you, your Honor.

23 Let me see if I can clarify a few points that may  
24 help the Court.

25 We gathered the email accounts in April 2013, after

1 this formulary change happened. So, any emails about --  
2 assuming they predated the actual change and they're not post  
3 -- talking about a post change would be captured in the  
4 information that we have gathered, and in responding to this  
5 second set of discovery, we searched those emails through  
6 April 2013 of Kim Bowlin, Jean Atkinson, Dr. Lister and Diane  
7 Austin, another potentially-involved person, and produced  
8 those documents.

9 So, what I think I hear Mr. Stranch asking for now is  
10 for us to attempt to preserve -- or capture, process, whatever  
11 word we want to use, the remainder of the email accounts from  
12 when we preserved them up through, I suppose, today and do  
13 searches of those, and we think that that is unduly  
14 burdensome, as we outlined in our response.

15 The second point --

16 THE COURT: My understanding, then, is that -- I  
17 guess to -- you did a search with -- it was an undated search  
18 at the time because you ran it in April 2013. So, you didn't  
19 capture things since April 2013 because that wasn't -- you did  
20 the search at that time. So, of course, it couldn't create  
21 things that were going to be generated in the future.

22 MR. TARDIO: Right.

23 THE COURT: I guess -- why doesn't your ongoing  
24 obligation to provide discovery mean that you wouldn't have  
25 checked the material after April 2013?

1 MR. TARDIO: Well, one is our protocol in place --

2 THE COURT: I see.

3 MR. TARDIO: -- I don't think, obligated us to  
4 capture or search anything beyond what we -- what we have.

5 Now, at this point I think the Court -- obviously,  
6 it's in the Court's discretion to say, no, you need to go back  
7 and get everything from April 2013 forward and search it, and  
8 if the Court orders us to do that, we'll obviously do it, but  
9 our position is that we've --

10 THE COURT: It wasn't a relevance objection. It was  
11 that if this is what you did, you thought the protocol -- that  
12 you've complied with the protocol on --

13 MR. TARDIO: We feel we complied with the protocol,  
14 past tense, and that we complied with our reasonable  
15 obligation to search and produce documents in response to this  
16 new set of discovery.

17 THE COURT: Because I didn't quite follow -- I'm  
18 looking now at Page 10 of your brief that says, "When the PSC  
19 served its second set of request for production focused on the  
20 formulary issues, counsel for SSC did not re-review each page  
21 of the 40,000 case relevant electronic documents. Instead,  
22 counsel searched for terms relevant to the topics raised in  
23 the PSC's second request for production."

24 So, I guess what I took from that -- I don't know if  
25 it's still 40,000 because you've turned over 5,000, right?



1 So, you went back and re-reviewed the 35,000 remaining  
2 documents, the documents that hadn't been produced, to see if  
3 they satisfied anything requested in the second set?

4 MR. TARDIO: No, we didn't go back and do a page-by-  
5 page review of the 40,000 or the 35,000.

6 THE COURT: So, what did it mean when you said you  
7 searched for terms relevant to the topic?

8 MR. TARDIO: We ran the search of terms specific to  
9 the formulary, formulary approved medication -- there were a  
10 couple of others -- through the custodians that we believed to  
11 have any potential involvement in the formulary change,  
12 Atkinson, Bowlin, Austin and Lister.

13 THE COURT: Okay. So, you ran it both in terms of  
14 custodians that you had already searched before and then you  
15 added some?

16 MR. TARDIO: No, we didn't add them. They were  
17 included the first time.

18 Let me let Mr. Cline -- he can explain it better than  
19 me because he's the one that actually did it.

20 MR. CLINE: Good morning.

21 We did two separate searches. So, we searched  
22 undated Kim Bowlin, Jean Atkinson, Diane Austin, Dr. Lister,  
23 undated. Then we searched the 40,000 documents returned by  
24 the pre --

25 THE COURT: Just for clarification, this is on the

1 second time you're doing this?

2 MR. CLINE: Yes, ma'am, in responding to the second  
3 request for production.

4 THE COURT: Okay.

5 MR. CLINE: And then we ran those same search terms  
6 through the 40,000 pages returned by the PSC's original search  
7 terms. So, there were two separate searches. There was a  
8 search that was date restricted --

9 THE COURT: So, I guess -- I know this is a small  
10 point. Why are you researching the 5,000 that you already  
11 turned over?

12 MR. CLINE: They weren't produced. We produced a  
13 subset of those documents.

14 When the parties negotiated the ESI protocol, they  
15 came to agreed search terms. So, all the data we collected  
16 was processed against the search terms. There were 40,000  
17 pages returned from that search. We then reviewed those for  
18 responsiveness in responding to the PSC's first request for  
19 production and produced 5,000 pages.

20 So, when we get the second set of request for  
21 production, we ran searches of those 40,000 pages rather than  
22 re-reviewing all 40,000 pages. Does that make sense?

23 THE COURT: Sorry. I'll have to go back and --

24 MR. TARDIO: We, basically, when we got the second  
25 set, went back and instead of reviewing page by page the

1 40,000, we did a targeted search.

2 THE COURT: It doesn't sound like you did a page-by-  
3 page on the first time around either. You ran the search  
4 terms.

5 MR. CLINE: No. We reviewed all 40,000 pages.

6 THE COURT: All right.

7 MR. CLINE: The 40,000 was a subset of the entire  
8 collection. The 40,000 pages hit the search terms the PSC  
9 gave us the first time.

10 THE COURT: And then you hand reviewed the 40,000?

11 MR. CLINE: Yes, ma'am.

12 MR. TARDIO: The first time around.

13 MR. CLINE: So, we didn't re-review them the second  
14 time around. We searched them the second time around.

15 THE COURT: All right.

16 MR. TARDIO: The second point -- and this may be  
17 another point of clarity. Mr. Stranch is correct, our initial  
18 position was we don't believe you're entitled to take a second  
19 deposition of Dr. Lister and Jean Atkinson.

20 I realize that they have raised issues, and we have  
21 never disputed that we produced the wrong document with the  
22 impression that it was the right one that was in effect in  
23 2012. Never disputed that. Have never said anything other  
24 than that's what we did and we shouldn't have done it. We  
25 screwed up the first time around.

1           Our position is if the Court is going to order Dr.  
2 Lister and Jean Atkinson to be deposed again, it should only  
3 be limited to these issues, and it does make sense to do it in  
4 the case-specific portion of these cases. They're going to be  
5 deposed again in the case-specific part of these cases, I'm  
6 assuming. I can't imagine they wouldn't be and can easily be  
7 folded into that deposition. What we want to avoid, as the  
8 Court alluded to, is a third -- basically, a third deposition  
9 of them.

10           THE COURT: And what is the timing with the SSC? Are  
11 they in the same -- they are in the same timing group as  
12 everybody else, right, or is it -- no?

13           MR. STRANCH: Separate.

14           THE COURT: They're separate?

15           MR. TARDIO: Right. They're behind the STOPNC cases.  
16 They were going along together for a while and they --

17           THE COURT: How many schedules do we have now? A lot.

18           MR. TARDIO: At least two from the standpoint --

19           THE COURT: (Indicating) I have a folder like this  
20 with the scheduling.

21           MR. TARDIO: Right, but they are behind the STOPNC  
22 cases and will be because the Calishers are potentially being  
23 added to the cases, which will -- little bit further on.

24           THE COURT: All right. Anything else?

25           MR. TARDIO: Yes. Let me make a couple more points.

1           The plaintiffs' position when it comes to spoliation  
2 or destruction of documents is that -- I think Mr. Stranch  
3 said something like, We know Jean Atkinson faxed a handwritten  
4 list of medications to prompt this change to the formulary.  
5 That's not exactly what the testimony has been, because nobody  
6 has come out and said, I remember this document existed.  
7 There was a fax. I saw it. The testimony has been much more  
8 equivocal.

9           Gina Calisher was asked about it. She said she very  
10 well could have. It could have been sent to me. It could  
11 have been faxed to me. Kim Bowlin, the other witness who  
12 talked about it, said, I assume. I really don't know.

13           So, there's not really any solid evidence in the  
14 record that a document -- a communication from Jean Atkinson  
15 to Gina Calisher to update the formulary in April or March of  
16 2013 exists, and there's definitely not any solid evidence  
17 that such a document has been destroyed.

18           And that leads to the next point that I would like to  
19 make for the Court, which is, let's say that the Court orders  
20 us to perform additional searches, which we submit would be  
21 burdensome and costly. I don't know that we can get around  
22 that. The Court, of course, has to make the balancing  
23 determination whether it's appropriate or not, but if the  
24 Court orders us to do these searches, we do the searches and  
25 let's say we find a document where Jean Atkinson in March or

1 April of 2013 says to Gina Calisher, the management company,  
2 Hey, we need to update this formulary. DepoMedrol is not on  
3 here. We need to update this. I don't believe that that is  
4 this smoking gun that the plaintiffs paint it as.

5 It's six months after the outbreak. It didn't --  
6 clearly, the fact that DepoMedrol was not on the formulary in  
7 2012, adding it or not having it on there, that didn't cause  
8 any injury to the plaintiffs. It's a paperwork issue. Is it  
9 sloppy? Can they argue to the jury, Hey, this is sloppy?  
10 They didn't update the formulary. They didn't even have a  
11 drug they were using on the formulary. They can make that  
12 argument, but they don't need a lot more searches and more  
13 depositions to make that argument.

14 The other point is that they had been using brand  
15 DepoMedrol for years at the clinic and there's never been any  
16 argument -- and I don't think there is even today -- that  
17 brand DepoMedrol is unsafe. In fact, the argument is the  
18 opposite, that we should have used brand DepoMedrol.

19 The only real relevance other than sloppiness that  
20 this -- the fact that DepoMedrol wasn't on the 2012 formulary  
21 has is if the argument is they were using brand DepoMedrol.  
22 It was unsafe. It wasn't on the formulary. That's not the  
23 argument.

24 I think at this point the plaintiffs are fishing a  
25 little bit to really hit Jean Atkinson over the head with this

1 document. She said at her deposition she didn't remember it.  
2 We've stipulated to these points. They have enough to impeach  
3 her at trial if they wish to do so, and we feel that  
4 additional searches, additional unlimited depositions will  
5 only add to the hours and cost of these cases and at this  
6 point are not necessary. Thank you, your Honor.

7 THE COURT: If I understand correctly as well, SSC  
8 was purchased by Cumberland after May 3rd of 2013?

9 MR. TARDIO: Hm-hmm.

10 THE COURT: So, I guess when you're asking for  
11 documents going forward, are we just talking about -- I don't  
12 think we're just talking about a month, right? You want --

13 MR. STRANCH: I believe it actually didn't end up  
14 closing until June; is that correct?

15 THE COURT: So, are we talking about two months of --

16 MR. STRANCH: Well, it's more than that, your Honor,  
17 because -- here's what's going on. You were told -- and they  
18 were very artful in the way they described it to you. We got  
19 the email boxes as of this date, but there's hard drives with  
20 documents on them. There's other places where electronic  
21 documents are stored outside of email, and those were the ones  
22 that they refused to go back and have because they stopped  
23 those at the end of 2012. So, nothing on there has been  
24 searched from 2013 on, and that's what I asked them to go back  
25 and gather, and they refused to. So, that's what we're

1 fighting over, in part.

2 Now, they cut off these emails in the middle of 2013.  
3 We know there were more changes made to the formulary after  
4 Gina Calisher's email back to Jean Atkinson and if those are  
5 after that date, we want those emails, too. So, they need to  
6 go ahead and take the email boxes through when Specialty  
7 Surgery shut down, which is only going to be a couple of  
8 months, and search them to see if there's additional  
9 information in there related to this issue.

10 And, your Honor, I want to address a couple of  
11 misrepresentations that were made to the Court. They're very  
12 frustrating to me. You heard them say, We now all agree this  
13 is the formulary that was in effect in 2012. Their discovery  
14 responses don't say that. Their discovery responses say, "The  
15 document now believed to be."

16 And so, we have to get to the bottom. Is it or is it  
17 not? They need to answer that question and we need to find  
18 out how it happened.

19 Now, they say, We don't know that any documents were  
20 destroyed. They said that this is all a bunch of hoodoo and a  
21 bunch of, you know, aspersions by the plaintiffs. Let me tell  
22 you, your Honor, Gina Calisher's own email back to Jean  
23 Atkinson says, I had a hard time reading your handwriting.  
24 The question was, did she scan it and email it to him or did  
25 she fax it to him? But there was handwriting on a document



1 that made these changes that Gina Calisher had a hard time  
2 reading.

3 So, it's just a flat misrepresentation to the Court  
4 to say that we don't know if that document exists or not,  
5 because that's what the changes were made based on, and that  
6 document has not been produced, and I think the jury is going  
7 to find it very instructive that these defendants modified  
8 their formulary and tried to pass it off on the Court and the  
9 plaintiffs to show that they were allowed to be using  
10 DepoMedrol, because the formulary says only these drugs, and  
11 they were using a drug not on the formulary that was in effect  
12 at the time. That is very relevant to a jury.

13 THE COURT: All right. Thank you. I will take it  
14 under advisement. What's the next thing on the schedule?

15 MS. JOHNSON: Those were the only two motions that  
16 the parties had sought oral argument on, your Honor.

17 There are -- by way of an update, rather than try and  
18 re-traverse the entire agenda, I think there are a few update  
19 items we can provide to the Court by way of what's going on  
20 with a few issues.

21 In terms of Tennessee, the Court had issued an order  
22 dealing with whether or not treating physicians at Howell  
23 Allen would be deposed, and just to share with the Court, some  
24 of those depositions have already occurred. Most of the rest  
25 are scheduled, and that is proceeding.

1           There is on the agenda a motion to amend the case  
2 management order relating to Specialty Surgery Center. That  
3 is not yet fully briefed, but will be by the next time. I  
4 believe the only remaining piece of that is plaintiffs' reply.

5           The Court also issued an order requiring the PSC to  
6 provide -- or, rather, sanctioning the written depositions,  
7 and the PSC has worked out with the defendants that we will  
8 provide our written questions by February 1st and we are  
9 working pretty furiously on that.

10           In terms of the Premier schedule, the Court did  
11 extend the deadline there, and just to report to the Court,  
12 that there are depositions of doctors that are scheduled in  
13 the next month or so and we're working with defense counsel  
14 for Premier to schedule a couple of additional depositions.

15           As to Box Hill, there are some efforts being made by  
16 the PSC to clean up some of Box Hill's discovery responses.  
17 Those may result in a motion to compel. We're not sure yet,  
18 but that may be something that you see before the next status  
19 conference.

20           Then in terms of the Rust-Omni access issue, we  
21 addressed that this morning, but the PSC and the defendants  
22 will work to get something filed with the Court, either an  
23 agreed-upon proposed order or statements of disagreements  
24 within the next two weeks.

25           THE COURT: I understand the PSC hasn't filed its

1 reply yet, but I did have a couple questions on the motion to  
2 amend with respect to Specialty Surgery and maybe we won't  
3 need oral argument. I can rule after the reply.

4 I was a little bit confused -- I think some of this  
5 has to do with when the motion was filed, and then my  
6 understanding is Judge Zobel granted the motion to amend to  
7 add Calisher.

8 So, what's happened since then? I mean -- and this  
9 may be because I wasn't paying attention at the time. Has the  
10 complaint -- have the complaints been served on Calisher?  
11 What's going on with that?

12 MR. STRANCH: So, the way it stands right now is when  
13 we filed our motions to amend, we attached those complaints to  
14 it. This is what we raised with Judge Zobel.

15 THE COURT: Yes.

16 MR. STRANCH: Because they've not been put on the  
17 docket yet. So, we asked her how she wanted to handle it  
18 earlier, and she said file them in the individual cases. So,  
19 we will file them in the individual cases, and then we'll work  
20 with Mr. Moran, who is the lawyer for Calishers, to work out a  
21 briefing schedule, because it's my understanding he's --

22 THE COURT: Is there a service issue or is that all  
23 taken care of by prior orders?

24 MR. STRANCH: I don't believe that there is a service  
25 issue.

1 THE COURT: You just need to identify yourself for  
2 the court reporter.

3 MR. MORAN: Thank you, your Honor. John Moran for  
4 Calisher & Associates, and Calisher & Associates has not been  
5 served with the complaints yet. I'm happy to work out with  
6 Mr. Stranch an agreement to accept service.

7 THE COURT: I would just be interested in the timing  
8 because, obviously, some of the discovery is going to depend  
9 on when you're served. I understand -- and then that will  
10 trigger a time for a motion to dismiss. I understand that may  
11 be in the offering.

12 And then I hadn't understood that we had stayed any  
13 other discovery in this case pending a resolution of a motion  
14 to dismiss. No?

15 MR. STRANCH: No.

16 THE COURT: Okay. Because it looked as if there was  
17 some suggestion that that should happen.

18 MR. MORAN: And, your Honor, my understanding is that  
19 the parties were in agreement that Calisher & Associates would  
20 have some time -- if its motion to dismiss was denied, would  
21 then have some time to take common-issue discovery.

22 THE COURT: So, that's my -- I don't understand --  
23 that hasn't been the practice, is my understanding, that  
24 discovery took place even while motions to dismiss are  
25 pending. You were just saying you got a separate agreement

1 from the PSC that might have been out of the norm or --

2 MR. STRANCH: No.

3 MR. MORAN: I think one of the twists, your Honor, is  
4 some of the discovery that we would like to take are  
5 depositions of Dr. Lister and Jean Atkinson, who had been  
6 deposed before. Specialty Surgery -- or those defendants,  
7 understandably, would rather not have us take their  
8 depositions if we're going to get out of the case, anyway.  
9 So, that was why the proposed order was set up the way it was.

10 THE COURT: All right. Well, that's helpful.

11 MR. STRANCH: Your Honor, we've got the motion to  
12 compel pending on those two. If that's ordered, Mr. Moran can  
13 take that deposition at the same time, because we -- unless  
14 there's some major revelations in the deposition and lots of  
15 testimony that everyone is not expecting, then there's no way  
16 it will take all day for us.

17 THE COURT: All right. So, that's helpful. I'll  
18 wait to have the reply. I'm not sure it's something that  
19 needs oral argument on. I mean, if there's anything that you  
20 would like to say now.

21 MR. MORAN: I won't be filing the reply. So --

22 THE COURT: No. I understand that, but you filed an  
23 opposition, right? Or are you in agreement?

24 MR. TARDIO: No. We filed an opposition -- Specialty  
25 Surgery Center filed an opposition that was basically saying

1 that the plaintiffs -- if the Court grants the motion to  
2 compel, that shouldn't open up common discovery for the  
3 plaintiffs again.

4 THE COURT: I see.

5 MR. TARDIO: And that was basically our position.

6 THE COURT: Okay. And did you want to add anything  
7 else, Mr. Tardio?

8 MR. TARDIO: No, ma'am.

9 THE COURT: Would the PSC like to add -- I know I'm  
10 getting a reply brief.

11 MR. STRANCH: We'll file a brief reply. I'm sure it  
12 will be eloquent and will cover everything.

13 THE COURT: You're humble, too.

14 MR. STRANCH: And, hopefully, very persuasive.

15 No. Your Honor, basically, there's still common  
16 discovery to be done here, particularly surrounding this  
17 formulary issue, and we shouldn't have artificial cutoffs that  
18 are basically going to require us to come back to the Court  
19 and ask the Court to reopen issues again. We should just  
20 leave it all open. Mr. Moran can do the discovery he needs to  
21 do during that time. We can do our follow-up on the formulary  
22 and anywhere else that that may lead us that we need to go to,  
23 and then we can move these cases into the Bellwether process  
24 as well.

25 THE COURT: All right. Sounds good. Anything else?

1 MS. MEEDER: Your Honor, I just wanted to clarify one  
2 thing. Earlier Ms. Johnson testified that the date upon which  
3 the PSC's cross questions for the Rule 31 depositions was --  
4 that they were due February 1st. I just wanted to clarify  
5 that's true. So, the Premier defendants' notices -- but the  
6 Box Hill notices have a response date of January 25th.

7 MR. KIRBY: Your Honor, Greg Kirby for the Box Hill  
8 defendants.

9 To make it consistent, we'll agree to make it  
10 February the 1st so that there's not two separate dates.

11 MS. MEEDER: Thank you.

12 THE COURT: Great. All right. Well, thank you  
13 everyone. I will see you in February.

14 MS. JOHNSON: Thank you.

15 MR. TARDIO: Thank you, your Honor.

16 COURTROOM DEPUTY CLERK YORK: All rise. The Court is  
17 in recess.

18 (Adjourned, 3:22 p.m.)  
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## C E R T I F I C A T E

I, Catherine A. Handel, Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript, from Page 1 to Page 39, constitutes to the best of my skill and ability a true and accurate transcription of my stenotype notes taken in the matter of No. 13-md-2419-RWZ, In Re: New England Compounding Pharmacy, Inc., Products Liability Litigation.

January 21, 2016  
Date

/s/Catherine A. Handel  
Catherine A. Handel RPR-CM, CRR